IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1686

LEO SHEEP COMPANY AND
PALM LIVESTOCK COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, AND
DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

CLYDE O. MARTZ
HOWARD L. BOIGON
DAVIS, GRAHAM AND STUBBS
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202

JOHN A. MACPHERSON
T. MICHAEL GOLDEN
MACPHERSON, GOLDEN AND BROWN
First Wyoming Bank Building
P.O. Box 999
Rawlins, Wyoming 82301

Attorneys for Petitioners

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Changing its theory once again, as it has done at every level of these proceedings, the United States now argues that Congress implicitly intended to reserve common law ways of necessity across the lands it granted for disposition by the railroad companies to finance railroad construction; to hold otherwise, respondent asserts, would simply be "inconceivable." Brief for the United States at 7. In the trial court, the United States — apparently knowing of no basis for imputing such intention to the

1862 Congress — merely contended that it was entitled as a matter of law to common law ways of necessity across petitioners' lands and that the Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-66, retroactively imposed rights of way on petitioners' lands. See Answer to Complaint, §§ 4, 12, R. 29-30; Defendants' Pre-Trial Memorandum at 1-2, R. 88-89; Defendants' Substituted Proposed Findings of Fact and Conclusions of Law, Conclusion Nos. 1-3, R. 307-08. In the Court of Appeals, the United States abandoned both of these theories and asserted instead, without support in legislative language or history or confirmation by administrative interpretation, that common sense compelled the conclusion that Congress in fact intended to reserve rights of way across the railroad grant lands. See Brief for the United States at 8-9. In this Court, the United States abandons its claim of any *actual* congressional intent in 1862 that rights of way be reserved, returning to a way of necessity theorem but relying now on a fictional intent it would infer from the common law rather than on an actual congressional purpose. Such vicissitudes in position manifest the difficulty respondent has apparently encountered in finding any factual or legal basis to support its conclusory assertion or the position of the Court of Appeals.

That respondent has also found it necessary to go far beyond the facts and issues stipulated in the trial court in an effort to characterize this case as one involving an unlawful obstruction of access to public lands in contravention of the Unlawful Inclosures Act is, we submit, a further acknowledgment of the weakness of its position on congressional intent. It seems to be saying to the Court, "if we don't have a right of way by implied

reservation, we may nonetheless preclude under the Unlawful Inclosures Act impediments to public land access." If this be so, respondent has remedies under the Unlawful Inclosures Act; it has not pursued them, however, and they are not at issue in this case.[1]

Amicus Energy Transportations Systems Inc. in its brief uses this case as a vehicle for presentation of arguments it is asserting in cases pending in the Tenth Circuit invo'ving subsurface crossings of the railroad right of way. See *Energy Transportation Systems, Inc. v. Union P.R.R.*, 456 F. Supp. 154 (D. Kan. 1978), *appeal pending*, Nos. 78-1680, 78-1681 (10th Cir.); *Energy Transportation Systems, Inc. v. Union P.R.R.*, 435 F. Supp. 313 (D. Wyo.

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[1]In its statement of facts to this Court, respondent includes several paragraphs ostensibly describing use of the public lands in the area of petitioners' lands and actions of petitioners or other parties with respect to such use. Brief at 3-4. These "facts" are derived from allegations in an amended answer filed by the Government after this case was submitted for decision on stipulated facts, R. 210, and are not contained in the stipulation of facts executed by the parties in the trial court, R. 107, or in the facts found by that court. Pet. App. ii-iii. The Court of Appeals so stated in its supplemental opinion in this case. Pet. App. xxiv.

Even if these allegations were facts, moreover, they would be irrelevant to this proceeding. This case is not an abatement action under the Unlawful Inclosures Act; rather, it is a case to quiet title against an asserted right-of-way reservation in a land grant made 23 years prior to enactment of that Act. Whether the circumstances that led to this action involved a denial by petitioners of public access to the east side of Seminoe Reservoir, as asserted by respondent and denied by petitioners, or involved activities by petitioners to protect their lands and operations from uncontrolled invasions and despoilment by hunters and other trespassers, as petitioners were prepared to show until the stipulation removed the question from the case (see Plaintiffs' Pretrial Memorandum at 3, R. 94), is of no relevance to the issue presented here; the question of title in this case depends upon construction of the 1862 grant to petitioners' predecessors, not actions of petitioners in the 1970's. If the United States believes that petitioners have unlawfully obstructed public lands, it has the option of invoking clear civil and criminal remedies under the Unlawful Inclosures Act; it has not elected to do so.

1977, *appeal pending*, No. 77-1770 (10th Cir.). These arguments are simply irrelevant to any question in the present case. Amicus acknowledges that no issue involving the railroad right of way granted under Section 2 of the Union Pacific Act is presented here, and it claims no interest in the lands granted under Section 3 of the Act that would be adversely affected by the decision in this case. See Brief of Energy Transportation Systems Inc. at 2-5. Moreover, amicus' insistence that Section 3 of the Act did not grant "unqualified" title, in that the grants under that section were limited by various express terms and conditions (unrelated to access rights) in the granting statute, is at most a semantic point without significance for this case; there is no dispute that all express statutory conditions of the grant were met or that such conditions were terminated by the patenting of the Section 3 lands to predecessors of petitioners.

This is a title case, involving only the question whether a right of way was reserved to the United States in 1862 across the lands granted under Section 3 of the Union Pacific Act; on that issue, arguments concerning access or the nature of the railroad right of way granted under Section 2 are not responsive, and the fictional intent now posited by the United States is insufficient as a matter of law to override clear contrary expressions of congressional purpose.

I. THE CHECKERBOARD FORM OF GRANT PROVIDES NO BASIS FOR NEGATING EXPRESS STATUTORY LANGUAGE.

The United States acknowledges that no right of way burdening petitioners' lands was expressly reserved from

the grant of lands under Section 3 of the Union Pacific Act. Brief at 6. It identifies no statutory language, congressional statement, or administrative interpretation over the past 115 years expressing or recognizing an intention by Congress to make such a reservation. Instead, it argues that the purpose of the land grant under the Union Pacific Act was to settle the lands *not* granted to the railroad companies, and that Congress must have intended to reserve rights of access over the railroad grant lands to achieve that purpose.

These premises of the United States are illusory and entirely erroneous. Although settlement of the West was no doubt a purpose of Congress in supporting transcontinental railroad construction, it clearly was not the purpose of the grants of the odd-numbered sections under Section 3 of the Union Pacific Act. Congress stated its purpose succinctly in Section 3 to be "aiding in the construction of [the] railroad," Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, and this Court has confirmed that this was the *only* purpose for which the grants were made. See petitioners' opening brief at 19-20. This Court has uniformly held, in light of such purpose as well as the careful attention of Congress to the delineation of interests to be reserved from the grant, that no reservations can be implied by the courts in addition to those expressly stated by Congress. See petitioners' opening brief at 9-14.[2] Con-

[2]Respondent attempts to distinguish the decisions of this Court in *Missouri K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491 (1878), and *Railroad Co. v. Baldwin*, 103 U.S. 426 (1880), on the theory that both cases involved the question whether certain sections had been implicitly reserved under railroad grant acts, while this case involves the question whether certain interests in admittedly granted sections had been reserved. Brief at 28. The holding in both cases was that, in view of clear statutory language and the over-all purposes of the railroad grant acts, the *only* reservations or exceptions from the

(Footnote continued next page)

gress itself considered and enacted the Unlawful Inclosures Act 23 years after the Union Pacific grant without mention in any debate or report of any reserved right of way that would provide access, and, after having been alerted to the right-of-way issue by the Secretary of the Interior after the Unlawful Inclosures Act had been enacted, confirmed the patents to the railroad grant lands without reservation. See petitioners' opening brief at 27-29, 34-36 nn. 17-18.[3]

Congressional intent must be judged from the perspective of the Congress that enacted the Union Pacific Act. *Platt v. Union P.R.R.*, 99 U.S. 48, 64 (1878). As the *Platt* decision suggests, Congress had no basis in 1862 for assuming that the checkerboard pattern would survive, but rather undoubtedly thought that the railroad lands would be settled in precisely the same way the retained even-numbered sections might concurrently be settled under the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392. Under Section 3 of the Union Pacific Act, all lands granted

grants were those clearly intended by Congress, *i.e.*, those expressly stated. That is to say, congressional intent was manifested by what Congress said. One case involved the grant of the support lands, the other involved the grant of a right of way, but in both cases the result was the same: when limitations were intended by Congress, they were made expressly. See also *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 11 (1893). Consistent authorities of this Court, cited on pages 12-14 of our opening brief, are to the same effect in other contexts.

[3] As pointed out by respondent, as recently as 1975 Congress assumed that it had not reserved ways of access to lands that are landlocked. See Brief for the United States at 34 n. 19. In its comprehensive study of the Nation's public lands, the Public Land Law Review Commission recommended that Congress develop a program for acquiring rights of way to landlocked lands, including lands "intermingled" with private lands. *One Third of the Nation's Land* 214-15 (1970). Respondent has identified no congressional statement in the 115 years following the Union Pacific Act expressing the view that rights of way had been reserved in 1862 over the lands granted under Section 3 of that Act or any other checkerboard grant legislation.

that were not "sold or disposed of" within three years after completion of the railroad were subject to "settlement and preemption, like other lands," at a price of $1.25 per acre to be paid to the railroads. Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492. Until the 1878 decision in *Platt*, sixteen years after the grant, recognized that the grant lands had been "disposed of" by large-scale mortgaging within the meaning of Section 3, Congress presumably anticipated that the lands within the boundaries of the railroad grants would be settled and developed contemporaneously with the homesteaded lands, and that access to tracts in the odd-numbered sections would be obtained, where needed, the same as access to tracts in even-numbered sections or in parts of the public domain other than checkerboard areas, *i.e.*, by cooperative development of roads in the normal course, through dedication, condemnation or public or private license.[4] Thirty-five years of experience with checkerboard grants had apparently not suggested anything to the contrary (see petitioners' opening brief at 17-18); 115 years of experience subsequent to the Union Pacific grant has seen the West settled with no apparent need, much less necessity, for the rights of way now asserted.

Further, if the question of access to the retained lands for development was of paramount congressional concern,[5] that concern would have been equally manifested

[4] Even after the *Platt* decision, when the Secretary of the Interior brought the access problem to Congress, he did not try to alter by interpretation what had previously been done by Congress but instead tried to secure corrective action by Congress in the form of condemnation legislation. See page 11, *infra*.

[5] Respondent places great reliance in this regard on the "double-minimum" policy proffered by advocates of the land grants as a justification for utilizing the land grants to subsidize the railroad. Brief at 17-19. In fact, the Union Pacific Act *omitted* the provision for doubling the minimum price for the retained lands that had been present in previous grant acts. See P. Gates, *History of Public Land Law Development* 366-67 (1968). Thus, under the Govern-

with respect to access to and settlement on the lands granted to the railroads. Yet, even now the Government denies that Congress intended to grant access rights to those lands over the public lands as an incident to the railroad grants. Brief at 11 n. 7.[6]

Finally, acceptance of the premise that Congress reserved a right of way by implication across each section of the granted lands would defeat not only the stated purpose of the grants, *i.e.*, aid in construction of the road, but also the purpose assumed by the Government, *i.e.*, the settlement of the West. Only by granting marketable title to the vendees of the Section 3 lands could Congress insure that the companies be able to raise funds, by mortgage or sale, to finance the railroad. It is difficult to imagine a more sweeping impairment of marketability of the granted lands than the Government is asserting in this case.[7] In its own words, uncompensated access is necessary for "public hunting, fishing, and other recreational uses . . . [a]ccess to federally leased deposits of coal, oil and gas resources . . . [g]razing access," and access for administration of the public land laws and inventory of the public lands. Brief at 34. Untold thousands of property owners who purchased their lands

ment's own premise, the development and sale of the retained lands clearly was not uppermost in the congressional mind in 1862.

[6] The United States argues that it was not necessary for Congress to grant such access rights to the railroads and their successors because the Act of July 26, 1866, ch. 263, 14 Stat. 253, *codified in* 43 U.S.C. § 932, granted the right of way for construction of highways over public lands. Brief at 11 n.7. This act, of course, was passed four years *after* the Union Pacific Act, when the existence of such rights of way was yet unestablished.

[7] It is for this reason that respondent's reliance on decisions like *Cappaert v. United States*, 426 U.S. 128 (1976), is misplaced, since the implication of rights of way benefitting the lands retained necessarily impairs title to the lands granted.

without knowledge of any claim by the Government of an interest therein are now to be subject to uncompensated public intrusion for a myriad of public purposes. In this case, the United States does not even seek access to particular even-numbered sections surrounded by petitioners' lands but rather asserts the right to construct a road across petitioners' lands for public access to a vast recreation area that could not have been envisioned in 1862. The effect on the security of titles to these lands could hardly be more profound.[8]

The Government has identified no legislative history or condition existing in 1862 that would have led the Congress to intend right-of-way reservations in derogation of its grant. To the contrary, the conditions giving rise to the Government's claim and the decision of the court below have twentieth century origins. They are, to put it simply, the current desire of the United States to build roads across patented lands in pursuit of current programs without meeting landowner requests for protection of the private lands and without payment of compensation, and a judgment by the Court of Appeals that, if Congress were making checkerboard grants of public lands today, with benefit of hindsight, it ought to re-

[8] The resulting title problems would affect persons other than present owners of the granted lands. The American Land Title Association, at page 6 of its brief to this Court in support of the petition for certiorari in this case, expressed concern that under the decision below,

> the members of this Association as insurors of titles, and attorneys who render opinions as to the state of titles, must hereafter exhibit to prospective transferees of land derived from federal and state grants, an exception, as an encumbrance on the title, for the claimed easement; and each may very well be subjected to claims for liabilities of staggering amounts to persons who have already received such insurance or opinions.

The railroad companies and their successors who have conveyed the granted lands for over 100 years by unrestricted warranties of title may under the decision below be liable for breach of their warranties.

serve access ways for benefit of the lands retained. Neither purpose is legally sufficient under decisions of this Court to justify a judicial revision of the 1862 act.

II. THE CURRENT ASSERTION BY THE UNITED STATES OF RIGHTS OF WAY BURDENING THE RAILROAD GRANT LANDS REVERSES MORE THAN A CENTURY OF CONSISTENT ADMINISTRATIVE RECOGNITION THAT NO SUCH RIGHTS OF WAY EXIST.

The United States has not identified in its brief any action by any federal official over the past 115 years evidencing a recognition or belief that Congress had reserved implied rights of way over the lands granted to the railroad companies. To the contrary, the United States acknowledges that it has *purchased* such rights of way when they were needed. See Brief for the United States at 31 n. 16.

Respondent claims only that the Secretary of the Interior in his 1887 report to Congress implicitly assumed the existence of implicit rights of way and asked only for legislation that would broaden the rights. Brief at 28-30. In fact, beginning with his report for the year 1882, the Secretary annually and at great length complained about the access problems that had developed with respect to public lands — especially checkerboard lands — and never once asserted that the United States had reserved rights of way by implication or otherwise in the railroad grant acts. See, *e.g.*, reports of the Secretary cited at page 34 n. 17 of petitioners' opening brief. One would expect that the strong concern of the Government for retaining or protecting access to public land would have produced an expression by some Government

official over the past 115 years to the effect that the United States had reserved rights of way for such access; respondent identifies no such statement. One would further expect, if enclosure problems were as critical in the range wars of the 1880's and 1890's as the Secretary described to the Congress, that the Secretary would have exercised whatever authority Congress had given him in 1862 to reserve rights of way in the patents that were subsequently issued to railroad grant lands. He did not do so in any of the patents through which petitioners claim in this case (Pet. App. ii), and the United States has identified no such reservation in any other patent.

Finally, respondent has not cited any case in which the United States, as party or amicus, has asserted a right of way over the railroad grant lands. To the contrary, until this case, the Government accepted the limitation on access identified by the Secretary in his 1887 report to Congress. As set out at page 29 of respondent's brief, the Secretary himself acknowledged without question that the railroad grants had come "to the assistance" of the cattlemen and rendered "powerless" the efforts of his Department to remedy the problem. In pursuit of a solution to the access problem, the Secretary recommended legislation that would permit the United States to *condemn* rights of way along the section lines of the lands previously granted. The Secretary's request and the subsequent judicial positions of the United States are entirely inconsistent with the notion that the United States had retained rights of way over the railroad grant lands.

It is thus clear that the United States is now reversing its longstanding interpretation of the railroad grants in an effort to take rights of way without paying

for them or otherwise proceeding in accordance with law as it has in the past. The authorities cited on pages 22-31 of petitioners' opening brief preclude such effort even if the interest now claimed by the United States in fact existed; that it does not exist is manifest from over a century of administrative practice.

III. CONGRESSIONAL INTENT TO IMPAIR THE TITLES TO FEE LANDS GRANTED TO THE RAILROAD COMPANIES CANNOT BE IMPUTED FROM, OR OVERRIDDEN BY, THE COMMON LAW DOCTRINE OF WAYS OF NECESSITY.

The United States argues that under the common law, in the absence of "inescapable evidence to the contrary," a grantor "necessarily intends to reserve a right of way where that is essential for access to his remaining property," and that this "implicit intent" must be recognized in the case of the congressional railroad grants since all "doubts" are resolved in favor of the Government. Brief at 10. Respondent acknowledges, however, that in this case, as always with congressional grants, it is congressional intent that controls. *Missouri, K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491, 497 (1878); *Schulenberg v. Harriman*, 88 U.S. (21 Wall.) 44, 62 (1874).

Acordingly, actual congressional intent to grant unimpaired title to the support lands conveyed to the railroads must prevail over any fictional intent imputed by the common law, which is properly applicable only to transfers between private parties. *Missouri, K. & T. Ry.*

v. Kansas P. Ry., supra, 97 U.S. at 497.[9] We have shown in petitioners' opening brief how the intent to vest absolute title in grantees of the support lands was manifested by Congress, recognized by federal officials, and confirmed by this Court. Brief at 9-22. Respondent does not challenge that showing.[10] See pages 5-12, *supra*. Thus, any intent imputed to Congress by respondent under the common law may not override the actual intent manifested by the Congress.

Beyond this, however, the intent on which respondent relies is imputed under the common law only when the proponent of a way of necessity establishes that *necessity* exists for creation of the easement.[11] When necessity is established, the courts will presume that the parties intended that a right of way exist to satisfy it (although this presumption is rebutted by evidence of

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[9] Even under the common law rules, the cases recognize that a way of necessity is negated by any evidence showing that the parties did not intend one to arise. See, *e.g.*, *Marzo v. Seven Corners Realty, Inc.* 171 F.2d 144 (D.C. Cir. 1948); *Lebus v. Boston*, 107 Ky. 98, 51 S.W. 609 (1899); *Daywalt v. Walker*, 217 Cal. App. 509, 31 Cal. Rptr. 899, (1963); *Orpin v. Morrison*, 230 Mass. 529, 120 N.E. 183 (1918); *Sayre v. Dickerson*, 278 Ala. 477, 179 So. 2d 57 (1965); 3 R. Powell, *The Law of Real Property* ¶ 410, at 34-71 to -72 (1978).

[10] The absence of any ambiguity in the grant of the Section 3 lands removes any basis for applying the rule that such ambiguities are to be resolved in favor of the Government; respondent has not even attempted to identify any ambiguity in the language of the Act. The principle that all doubts are to be resolved in favor of the Government, moreover, does not justify the "withholding of that which it satisfactorily appears the grant was intended to convey," *Russell v. Sebastian*, 233 U.S. 195, 205 (1914); see *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 14 (1893).

[11] Because of the concern that a grantor not detract from his grant, the cases hold that the implication of ways of necessity by *reservation* rather than by grant is not favored and is limited to ways of *strict* necessity. See, *e.g.*, authorities cited in 2 G. Thompson, *Real Property* § 362, at 420 n. 84 (1961); *United States v. Rindge*, 208 F. 611, 620 (S.D. Cal. 1913); 5 *Restatement of Property* § 476, comment c (1944).

actual intent: see note 9, *supra*). See 2 G. Thompson, *Real Property* § 364, at 431 (1961); 3 R. Powell, *The Law of Real Property* ¶ 410, at 34-60, 34-65 to 34-72 (1978). "[W]hether easements by necessity are believed to be products of public policy or to be the embodiments of inferences as to the intent of the parties, they should be establishable by proof that they are necessary to the reasonable utilization of the claiming dominant parcel." 3 R. Powell, *supra*, ¶ 410, at 34-69; see 2 G. Thompson, *supra*, § 364. If no necessity is proved to exist, no intent to reserve a right of way is imputed; necessity in this context, in other words, is the mother of intention.[12]

Thus, no intent to reserve ways of necessity burdening the lands granted under Section 3 of the Union Pacific Act can be imputed to Congress; the United States, as sovereign, can always create whatever access it needs and thus cannot make the requisite showing of necessity. The trial court so held in this case, and the authorities uniformly agree. *E.g., State v. Black Bros.*, 116 Tex. 615, 629-30, 297 S.W. 213, 218-19 (1927); *Pearne v. Coal Creek Min. & Mfg. Co.*, 90 Tenn. 619, 627-28, 18 S.W. 402, 404 (1891). The existence of the power of eminent domain quite simply negates the necessity for inferring a substitute for it. See, *e.g., Alcorn v. Reading*, 66 Utah 509, 518-20, 243 P. 922, 926 (1926); *Simonson v. McDonald*, 131 Mont. 494,

[12] When the common law doctrine is thus understood, it becomes apparent that respondent's present reliance on the common law doctrine is in effect a concession that Congress did not in fact intend to reserve any right of way over the railroad grant lands. What the United States seeks in this case is nothing less than judicial implication of an intent nowhere manifested by Congress, in contravention of both the rule that congressional intent is determinative in the construction of federal grants and the limitation on the role of the judiciary in construing such grants. See *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911).

497-501, 311 P.2d 982, 984-86 (1957); *Backhausen v. Mayer*, 204 Wis. 286, 234 N.W. 904 (1931).[13]

The United States, grantor of hundreds of millions of acres of public lands, is not by any measure in the same position as that of a private grantor who conveys an isolated parcel of land. As the court said in *United States v. Rindge*, 208 F. 611, 619 (S.D. Cal. 1913), in rejecting the contention that the United States could assert a way of necessity on behalf of the public:

> A doctrine so contrary to the general theory of the rights acquired by patentees of public lands and guaranteed to private owners by the Constitution challenges attention. Its effect is strikingly apparent in the case at bar. The result of the government's position, if sustained, will be to divide the Malibu Ranch by what are in effect public highways into 10 or 12 different tracts, thus materially impairing its value and usefulness to the owner, and that without compensation. It is, in my judgment, very doubtful whether the doctrine of implied ways of necessity has any application to grants from the general government, under the public land laws. . . . The public domain is disposed of under general laws, and the rights conferred and reserved are defined by such laws, and rules and regulations made in pursuance thereof. If the sale or conveyance of one portion of such domain prevents access to another, it would

[13] Further, the effort by the United States in this case to assert necessity as a justification for constructing a road across petitioner's lands for public access to a reservoir not in existencce in 1862 at the time of severance would not suffice under the common law rules, since a claimant cannot himself create a "necessity" which did not reasonably exist at the time of the original severance. See 3 R. Powell, *supra*, ¶ 410, at 34-70.

> seem to be a contingency which the government was bound to contemplate in making the conveyance. . . . [I]t would seem that the government . . . reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of the grantee was acquired.

Other cases refusing to find the existence of ways of necessity in grants of the sovereign include *Guess v. Azar*, 57 So. 2d 443, 445 (Fla. 1952); *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 4 Cal. App. 180, 182-83, 87 P. 237, 238 (1906); *Thomas v. Morgan*, 113 Okla. 1212, 240 P. 735 (1925); *McIlquam v. Anthony Wilkinson Live Stock Co.*, 18 Wyo. 53, 104 P. 20 (1909).[14]

Further, under the law of Wyoming, where petition-

[14] Many of these cases refused to find easements of necessity on behalf of the sovereign for the additional reason that such easements would have to be reciprocally implied over the public lands. *E.g., United States v. Rindge, supra*, 208 F. at 619; *Pearne, v. Coal Creek Min. & Mfg. Co., supra*, 90 Tenn. at 627-28, 18 S.W. at 404; *Guess v. Azar, supra*, 57 So. 2d at 445; *Bully Hill Copper Mining & Smelting Co. v. Bruson, supra*, 4 Cal. App. at 182-83, 87 P. at 238. Even the decision cited by the United States, *United States v. Buford*, 8 Utah 173, 30 P. 433 (1892), *writ of error dismissed*, 154 U.S. 496 (1893), so holds. Respondent's attempt to invoke the rule for its own benefit and at the same time deny its logical reciprocal for the benefit of those claiming against the United States (Brief at 11 n. 7) serves only to emphasize the lack of authority and equity for the position of the United States in this proceeding. Beyond this, however, if the owners of land in the odd-numbered sections could assert no necessity for the implication of roads across the even-numbered sections because of the Act of 1866 approving construction of highways, as the Government contends (see note 6, *supra*), the same rationale appears equally applicable to deny the necessity of roads across the odd-numbered sections for access to privately owned lands in the even-numbered sections, in light of both the Government's eminent domain authority and the presumption that homesteaders of the even-numbered sections would have access available through the common interest of settlers in the area in the development of access roads.

ers' lands are situated, even a private party does not have a way of necessity in the circumstances of this case. The Wyoming rule is that the checkerboard lands are *not* burdened with ways of necessity for benefit of the retained lands. *McIlquam v. Anthony Wilkinson Live Stock Co*., 18 Wyo. 53, 104 P. 20 (1909). In addition, a Wyoming statute permits the condemnation of ways of access on behalf of a landlocked property owner on payment of compensation. Wyo. Stat. Ann. §§ 24-9-101 to -104 (1977). In *Snell v. Ruppert*, 541 P.2d 1042 (Wyo. 1975), the Wyoming Supreme Court stated that this statute provides complete relief to a landlocked property owner, and thus removes any need to resort to common law ways of necessity. 541 P.2d at 1046. Thus, no private owner of land in the even-numbered sections within the boundaries of the railroad grant in Wyoming may assert a way of necessity over any part of the odd-numbered sections.

Under the decision below, and the reasoning of respondent here, the United States, which has the power to take whatever access it needs, would be entitled to such ways in situations where private parties are not, and would be free of any obligation to pay just compensation where private parties would be required to make such payments. Respondent cites no evidence of congressional intent to place the United States in such a favored position; the requirement that the United States pay a fair price for land that it takes imposes no special burden on the United States not shared by any other Wyoming landowner.

IV. THE BROAD-BRUSH CLAIM OF THE UNITED STATES THAT ITS POSITION IS SUPPORTED BY A "CLEAR MAJORITY" OF THE DECIDED CASES HAS NO FOUNDATION IN FACT.

Petitioners can find no basis in the briefs or elsewhere for the unqualified assertion by the United States that the "clear majority" of the decided cases are in accord with the decision below implying the existence of reserved ways across the lands granted by the United States in 1862. Brief at 20. The statement ignores all the authorities cited herein negating such implication, see pages 12-17, *supra*, and is premised upon authority that is either no longer good law or upon analysis supports the position of petitioners rather than that of respondent.

Respondent argues that the decision of this Court in *Camfield v. United States*, 167 U.S. 518 (1897), requires affirmance of the decision below because the supposed "refusal [of petitioners] to allow access over any corner of their land in order to reach the interlocking sections of public domain operates effectively as an inclosure of those public lands." Brief at 20. *Camfield*, however, was concerned with a scheme to appropriate exclusive use of the public lands by the erection of fences on borders of contiguous fee sections, and it held that under the Property Clause, U.S. Const., Art. IV, § 3, cl. 2, the Unlawful Inclosures Act could constitutionally reach such activities on private lands. Cf. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). The Court in *Camfield* did not determine that the United States had reserved rights of way across the odd-numbered checkerboard sections. On the contrary, the Court expressly recognized that the owner of the odd-numbered sections had absolute and unqualified title to these lands, emphasizing that he would "doubtless" have the right to fence each section separately since "he is entitled to the complete and exclusive enjoyment of [his own land], regardless of any detriment

to his neighbor." 167 U.S. at 527-28.[15] A determination by the Court that the United States had rights of way in defendants' land would have disposed of the entire controversy and mooted the constitutional issue decided by the Court, since the fences in such event would have been situated on easements of the United States rather than on lands owned exclusively by defendants.

Respondent's reliance on *Buford v. Houtz*, 133 U.S. 320 (1890), is similarly misplaced. As we showed at pages 38-39 of petitioners' opening brief, *Buford* did not purport to hold that there existed a reservation of public rights in private lands but, like *Camfield*, involved ac-

[15] Respondent characterizes this statement, and the Court's accompanying elaboration that the Unlawful Inclosures Act permitted abatement only of fences "intended to enclose the lands of the Government," 167 U.S. at 528, as "dictum" indicating "at most that intent is an element of the criminal offense" under the Act. Brief at 24-25 n. 14. The statement of the Court is not on its face so limited, and *Camfield* itself was a civil case. Moreover, in support of this characterization of the Court's language, respondent cites a decision of the Ninth Circuit in a *civil* action under the Act for abatement of fencing, *Golconda Cattle Co. v. United States*, 201 F. 281 (9th Cir. 1912), which the Ninth Circuit *reversed* on rehearing on the ground that intent to appropriate public lands was a necessary element of proof in a civil case under the Act. 214 F. 903, 909 (9th Cir. 1914). The intent requirement was applied in several other civil cases in the Ninth Circuit. *E.g., United States v. Rindge*, 208 F. 611, 623-24 (S.D. Cal. 1913); *United States v. Johnston*, 172 F. 635 (N.D. Cal. 1908). The other case cited by respondent, *Homer v. United States*, 185 F. 741 (8th Cir. 1911), was a decision of the predecessor of the court below in a civil case which refused to follow the statement in *Camfield* and held that lack of intent was *not* a defense to an abatement proceeding under the Act. Judge (later Justice) Van Devanter dissented from this holding. 185 F. at 747.

After the decision in *Camfield*, several other courts, including the Wyoming Supreme Court, have recognized that a landowner may fence his own land or otherwise make legitimate use of it in such manner as to deny access over it to the public lands, and that nothing in the Unlawful Inclosures Act or any other act of Congress requires a contrary result. *Anthony Wilkinson Live Stock Co. v. McIlquam*, 14 Wyo. 209, 224-28, 83 P. 364, 368-69 (1905); *State v. Bradshaw*, 53 Mont. 96, 103, 161 P. 710, 713 (1916); *Sacra v. Jones*, 37 N.M. 40, 43, 17 P.2d 552, 554 (1932); *Callison v. Ronstadt*, 21 Ariz. 348, 138 P. 266 (1920); *Stapp v. Nickels*, 150 Mont. 220, 434 P.2d 141 (1967).

tivities designed to monopolize the *public* lands. The decision of the Eighth Circuit, predecessor to the court below, in *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), also cited by the Government, is to the same effect.[16] *Buford*, like *Camfield*, in fact confirms the lack of existence of any reserved right of way in the United States; it relied on fencing law rather than publice servitudes to support the open range practices of the time.

The remaining authorities cited by respondent are either fencing law cases like *Camfield* and *Buford*,[17] involve the railroad right of way rather than the railroad

[16] To the extent that *Mackay* may be construed as a holding that the Unlawful Inclosures Act permits willful trespass over fenced checkerboard lands for access to public lands, it would contravene not only the Court's decision in *Camfield* but also its subsequent decisions in *Lazarus v. Phelps*, 152 U.S. 81 (1894) and *Light v. United States*, 220 U.S. 523, 537 (1911), and would be contrary to the cases cited in footnote 15, *supra*. See also *Cosgriff v. Miller*, 10 Wyo. 190, 222-24, 68 P. 206, 211-12 (1902); *Healy v. Smith*, 14 Wyo. 263, 83 P. 583 (1906); *Anthony Wilkinson Live Stock Co. v. McIlquam*, 14 Wyo. 209, 227-28, 83 P. 364, 369 (1905).

[17] *Jastro v. Francis*, 24 N.M. 127, 172 P. 1139 (1918), *writ of error dismissed*, 249 U.S. 581 (1919), cited by respondent, was an access case presenting the same fence law issue as that addressed by this Court in *Buford v. Houtz*, 133 U.S. 320 (1890). It has been construed by the New Mexico Supreme Court to have held only that one who fails to mark the boundaries of his land as required by statute was not entitled to an injunction against the trailing of stock thereon. *Sandoval v. Chavez*, 27 N.M. 70, 196 P. 322, 322-23 (1921). Nowhere in *Jastro* did the court mention the existence of any way of necessity reserved by the United States, and the case, like the other fencing cases, was in fact decided on grounds *negating* the existence of any such right of way. See also *Gutierrez v. Montosa Sheep Co.*, 25 N.M. 540, 543, 185 P. 273, 274 (1919); *Sacra v. Jones*, 37 N.M. 40, 43, 17 P.2d 552, 554 (1932).

In *Northern P. Ry. v. Cunningham*, 89 F. 594 (C.C. D. Wash. 1898), the court merely assumed for purposes of argument that defendant had a way of necessity across plaintiffs' lands but held that the existence of such a way would not protect defendant from an injunction against his trailing of sheep across plaintiff's lands because of a state statute making unlawful the pasturing of sheep on lands of another.

grant lands,[18] or have been subsequently overruled by authorities confirming that no way of necessity exists in favor of a landowner vested with eminent domain authority.[19]

[18] *H. A. & L. D. Holland Co. v. Northern P. Ry.*, 214 F. 920, 926 (9th Cir. 1914) states only that Congress undoubtedly contemplated that crossings of the railroad right of way would be necessary; this Court had previously made the same assumption, and in fact had coupled this assumption with the recognition that the police power of the states would be necesary to accomplish such crossings. *Northern P. Ry v. Townsend*, 190 U.S. 267, 272 (1903). The nature of rights in the railroad right of way granted under Section 2 of the Union Pacific Act is not involved in this case.

[19] In *Hecht v. Harrison*, 5 Wyo. 279, 40 P. 306 (1895), the court specifically *refused* to determine whether the United States had reserved ways of necessity burdening the lands granted to the Union Pacific Railroad Company, see 5 Wyo. at 284, 40 P. at 307, and in fact subsequently that court held that no such ways existed. *McIlquam v. Anthony Wilkinson Live Stock Co.*, 18 Wyo. 53, 104 P. 20 (1909).

Herrin v. Sieben, 46 Mont. 226, 127 P. 323 (1912), which respondent quotes at length (Brief at 21-22), was subsequently "expressly overruled" by the Montana Supreme Court on the ground, *inter alia*, that the existence of statutory eminent domain authority in private persons to create access roads negated the necessity required to imply common law easements. *Simonson v. McDonald*, 131 Mont. 494, 501, 311 P.2d 982, 986 (1957). In *Thisted v. Country Club Tower Corporation*, 146 Mont. 87, 103, 405 P.2d 432, 440 (1965), cited by respondent, the Montana Supreme Court refused to extend *Simonson* to preclude construing a deed to impose on the transfers of condominium units implied equitable servitudes requiring that the units be used for residential purposes only. *Simonson* was limited by the court "to the facts existent in that case," which involved claimed ways of necessity across checkerboard lands, and was not taken as authority for the negation of all implied covenants in the state. Thus, it is clear that *Herrin v. Sieben* has been expressly overruled in Montana on the precise point involved in this case.

United States v. Buford, 8 Utah 173, 30 P. 433 (1892), *writ of error dismissed*, 154 U.S. 496 (1893), was a case presenting the same issue later decided by this Court in *Camfield*, *i.e.*, whether the Unlawful Inclosures Act could be applied to abate fencing on private checkerboard lands intended to enclose public lands. Since there was doubt whether the Act could reach such fencing, see *United States v. Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 22 P. 92 (1889), the Utah court in *Buford* held that the United States had reserved ways across the grant lands so that the fences of defendants obstructing such ways could not be maintained. The subsequent decision of this Court in *Camfield*, upholding the power of Congress to abate fences on private lands intended to enclose public lands, removed the need for this rationale, and in fact the Utah Supreme Court itself subsequently

(Footnote continued next page)

V. CONCLUSION.

It is not the function of a court, on hindsight, to impute a purpose to Congress it clearly did not have; to do so would be to usurp the legislative authority of Congress. Perhaps the clearest evidence of the lack of necessity for the reservation of access easements in the checkerboard grants is the very paucity of cases to which the United States refers. It seems fair to assume that the necessity presumed by respondent would have prompted substantial litigation or remedial legislation over the 115 years since the Union Pacific grant. In fact, this case appears to be the first instance in which the United States has asserted the right it claims here; the reason perhaps is, as acknowledged by the United States, that officers of the United States have heretofore purchased such access ways as were needed.

At all times since 1862, the United States has had ample means of protecting its interest and safeguarding the rights of the public with respect to public lands. Indeed, when the United States acquired petitioners' lands for the flooding of Seminoe Reservoir, it could easily have acquired rights of way thereto. It hardly comports with Fifth Amendment notions of due process and just compensation for the United States now to visit the consequences of this past oversight on petitioners.

For the reasons stated herein and in petitioners' opening brief, petitioners respectfully pray that the

recognized that ways of necessity could not be implied where the power of eminent domain provided a suitable alternative. *Alcorn v. Reading*, 66 Utah 509, 243 P. 922 (1926); *Adamson v. Brockbank*, 112 Utah 52, 185 P.2d 264 (1947). The court in *Buford* also held that ways of necessity existed across the even-numbered sections for access to the odd-numbered sections, a holding which the United States claims here to be erroneous. See note 6, *supra*.

judgment of the Court of Appeals be reversed and that the judgment of the District Court quieting petitioners' titles against the United States be affirmed.

Respectfully submitted,
CLYDE O. MARTZ
HOWARD L. BOIGON
DAVIS, GRAHAM AND STUBBS

JOHN A. MACPHERSON
T. MICHAEL GOLDEN
MACPHERSON, GOLDEN AND BROWN

Attorneys for Petitioners